UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 53 | Number 4 Article 10

4-1-1975

Constitutional Law -- Procedural Due Process in Prison Disciplinary Proceedings -- The Supreme Court Responds

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maximum prison term of four years.[68]

Schick wanted to avoid the restriction of the President's pardoning power by Congress. However, in doing so, the Court allowed the executive branch to exercise powers that were vested in Congress. The Court had previously stated that "the authority to define and fix the punishment for crime is legislative . . . and . . . the right to relieve from punishment, fixed by law and ascertained according to methods by it provided, belongs to the executive department."[69] More recently the Court stated that "[t]he punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress . . . ."[70] The Court could have permitted both branches to exercise their given functions, had it recognized the right of Congress to define the outer boundaries of the President's pardoning power.

In light of this intrusion of the executive branch into the legislative domain, it is unfortunate that *Schick* did not clarify the actual basis for its holding. The Court announced that its decision was grounded in the "history of the English pardoning power."[71] Nevertheless, an examination of the decision shows that the Court's conclusions deviated from the common-law principles significantly. Rather than attempting to invoke the common law, the Court could have openly announced that it was abandoning an historical approach and was basing its decision on currently existing conditions. The Court then could have proceeded to enumerate the considerations upon which it based its conclusion that the President has the right to prescribe and impose punishments on individuals without either the prisoners' consent or the Congress' authorization. Such an approach would have illuminated both the scope of the President's pardoning power and the nature of his relation to Congress.

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Constitutional Law—Procedural Due Process in Prison Disciplinary Proceedings—The Supreme Court Responds

Most correctional systems reduce an inmate's sentence as a reward for serving periods of his confinement without incurring dis-

68. *Id.*
69. *Ex parte* United States, 242 U.S. 27, 42 (1916).
70. Bell v. United States, 349 U.S. 81, 82 (1955).
71. 95 S. Ct. at 385.

ciplinary sanctions.[1] These same correctional systems often revoke this "good-time" credit as punishment for major violations of prison rules.[2] Alternatively, prison authorities may restrict the inmate to a disciplinary cell—commonly known as solitary confinement.[3]

In *Wolff v. McDonnell*[4] the United States Supreme Court recently determined that the imposition of either of these punishments is so serious a deprivation of liberty that the inmate must be accorded the constitutional protections of due process.[5] In so ruling the Court also prescribed the minimum procedural safeguards necessary to satisfy due process in prison disciplinary proceedings.[6] Even though this decision appears to enhance prisoners' rights, the minimum procedures required in *Wolff* may not be sufficient to prevent arbitrary action by state prison authorities.

THE CASE

Robert O. McDonnell, an inmate at a Nebraska prison, filed a complaint on behalf of himself and other inmates for damages and injunctive relief under 42 U.S.C. Section 1983. He alleged that the prison's disciplinary procedures, which might result in confinement in a disciplinary cell or loss of good-time, violated the due process clause of the fourteenth amendment.[7]

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1. Note, *Procedural Due Process in Prison Disciplinary Actions*, 2 LOYOLA U. OF CHICAGO L.J. 110, 111 & n.8 (1971).

2. *See, e.g.*, N.C. STATE CORRECTIONS SERVICE, GUIDEBOOK § 2-408(b)(3) [hereinafter cited as GUIDEBOOK].

3. Note, 2 LOYOLA U. OF CHICAGO L.J., *supra* note 1, at 111. "This 'prison within a prison' usually is a place of solitary confinement, sometimes without bedding or toilet facilities, accompanied by reduced diet and limited access to reading materials or other diversions, and occasionally without any kind of light." THE UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 50 (1967) [hereinafter cited as CORRECTIONS].

4. 418 U.S. 539 (1974).

5. *Id.* at 558, 571-72 n.19.

6. *Id.* at 563-72. In recent years the question of what procedural safeguards are demanded in prison disciplinary proceedings has occupied the time of many lower federal courts and has produced a variety of results. *See, e.g.*, Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974); Meyers v. Alldredge, 492 F.2d 296 (3d Cir. 1974); Braxton v. Carlson, 483 F.2d 933 (3d Cir. 1973); United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971).

7. In addition, McDonnell alleged that the inmate legal assistance program did not meet constitutional standards and that the regulations governing inmates' mail were unconstitutionally restrictive. 418 U.S. at 543. This note will not deal with the issues raised by these allegations.

The district court denied relief,[8] but the Eighth Circuit Court of Appeals reversed[9] on the due process claim. The court of appeals held that due process rights must be provided and that the procedural safeguards for parole revocations and for probation revocations set out by the Supreme Court in *Morrissey v. Brewer*[10] and in *Gagnon v. Scarpelli*[11] were generally applicable to disciplinary proceedings within the prison.[12]

Pursuant to a petition for certiorari,[13] the Supreme Court affirmed in part the court of appeal's decision. The Court agreed that due process rights attached,[14] but declined to follow the court of appeals and adopt the full range of procedures established by *Morrissey* and *Gagnon*.[15] Instead, the Court felt that the "closed, tightly controlled environment" in which prison disciplinary proceedings take place, the special security problems of prisons, and the necessity for flexibility in the correctional process warranted reduced procedures[16] and thus held that due process required only that an inmate be given: (1) notice of the charges and a brief period of at least twen-

8. McDonnell v. Wolff, 342 F. Supp. 616, 628 (D. Neb. 1972). The district court relied on the Eighth Circuit Court of Appeals decision in Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972), denying due process in parole revocation proceedings. Subsequent to the district court's decision in *McDonnell* but prior to court of appeals action, the United States Supreme Court reversed the Eighth Circuit in *Morrissey* and held that due process was required in the parole revocation situation.

9. McDonnell v. Wolff, 483 F.2d 1059, 1062-63 (8th Cir. 1973).

10. 408 U.S. 471 (1972).

11. 411 U.S. 778 (1973).

12. The court of appeals remanded the case to allow the district court to determine whether Nebraska's procedures met due process and to grant the permissible relief. 483 F.2d at 1064. The court of appeals held that the restoration of good-time credits under 42 U.S.C. § 1983 (1970) was foreclosed under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), but suggested that any determinations of misconduct made in proceedings which failed to comport with due process could be expunged from prison records. 483 F.2d at 1064. The Supreme Court agreed with the court of appeals about *Preiser*'s foreclosure of restoration of good-time credits as a remedy under section 1983. 418 U.S. at 555. However, the Court disagreed with and reversed the court of appeal's application of due process retroactively that would have allowed the expunging of the prison record. *Id.* at 573. The Court said,

> Despite the fact that procedures are related to the integrity of the fact-finding process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures.

Id. at 573-74.

13. Wolff v. McDonnell, 414 U.S. 1156 (1974).

14. 418 U.S. at 558.

15. *Id.* at 560.

16. *Id.* at 560-63.

ty-four hours to prepare a defense;[17] (2) the opportunity "to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals";[18] and (3) "a 'written statement of the factfindings as to the evidence relied upon and the reasons' for the disciplinary action taken."[19] The Court specifically denied inmates the rights of confrontation and cross-examination[20] and the aid of either retained or appointed counsel.[21] However, the Court did require substitute aid by fellow inmates or staff personnel—at least "[w]here an illiterate inmate is involved . . . or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case . . . ."[22] Finally, the Court held that hearing boards composed solely of prison officials could be sufficiently impartial to satisfy due process.[23]

THE REQUIREMENT OF DUE PROCESS

Today, it is axiomatic that inmates in state institutions continue to enjoy many constitutional protections, including due process of law, after incarceration.[24] The question in *Wolff*, therefore, was not whether prisoners retain the protections of due process generally, but whether the protections of the due process clause extend to proceedings in which prisoners may be confined in a disciplinary cell or lose good-time credits.[25]

The general standard for determining when due process rights attach has been first to determine whether the private interest that is to be adversely affected is a protected interest and, if so, to determine if loss of the interest will be "grievious." Once it is clear that

17. *Id.* at 564.
18. *Id.* at 566.
19. *Id.* at 564, *quoting* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).
20. *Id.* at 567-68.
21. *Id.* at 570.
22. *Id.*
23. *Id.* at 571.
24. *See* Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) (religious freedom); Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (due process); Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam) (due process); Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam) (access to the courts); Johnson v. Avery, 393 U.S. 483 (1969) (access to the courts); Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (protection against invidious discrimination); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (religious freedom).
25. 418 U.S. at 557.

the individual stands to suffer a grievous injury to a protected interest, due process rights must be granted unless, on balance, the governmental interest in summary proceedings outweighs the possible loss.[26]

Applying the general standard, the *Wolff* Court conceded that good-time credit is not constitutionally required but instead is a state-created right.[27] Nevertheless, the Court felt that once the state had given the right, "the prisoner's interest has real substance and is . . . embraced within Fourteenth Amendment 'liberty' . . . ."[28] Having found a protected interest, the Court held that "[t]he deprivation of good-time is unquestionably a matter of considerable importance"[29] and that the deprivation was sufficient, on balance, to require the protections of due process.[30] In the case of confinement in a disciplinary cell the Court held, "as in the case of good-time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction."[31] The Court reached this decision because it felt the "major change in the conditions of confinement"[32] that accompanies solitary confinement is "difficult for the purposes of procedural due process to distinguish . . . [from when] . . . good-time is forfeited. . . ."[33]

Arguably, the Court's reasoning will also reach other penalties imposed for serious misbehavior[34] such as revocation of a parole release date[35] or reduction of a conduct "grade."[36] The revocation or modification of a parole release date may postpone an inmate's release on parole and, thereby, increase his time of confinement. A reduction in a conduct "grade" could result in a significant change in the conditions of confinement by causing transfer to a more maxi-

26. *See* Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

27. 418 U.S. at 557.

28. *Id.*

29. *Id.* at 561.

30. *Id.* at 557.

31. *Id.* at 571 n.19.

32. *Id.*

33. *Id.*

34. *Id.* at 581 n.1 (Marshall, J., dissenting).

35. Parole release dates are dates, set by statute, upon which an inmate becomes eligible to have his case for parole heard. *See, e.g.*, N.C. GEN. STAT. § 148-58 (Supp. 1974).

36. The North Carolina corrections system provides for the classification of prisoners on the basis of conduct as either "honor" grade, "A" grade, or "B" grade and for the reduction of grade as punishment for "major" misconduct. GUIDEBOOK, *supra* note 2, §§ 2-101, -408(4).

mum security institution and by terminating the inmate's eligibility for work-release programs or other activities outside the prison.[37] The inmate's interest in avoiding either of these penalties seems to be of sufficient substance to require due process before their imposition.[38]

THE ELEMENTS OF DUE PROCESS

"[D]ue process is flexible and calls [only] for such procedural protections as the particular situation demands."[39] In *Wolff* the Supreme Court declined to apply the *Morrissey-Gagnon* procedures for prison disciplinary proceedings.[40] This decision was based on a perceived distinction between disciplinary proceedings and parole and probation revocations and on the unique "stake the State has in the structure and content of the prison disciplinary hearing."[41]

The distinction between revocation proceedings and disciplinary proceedings lies in the immediacy of the loss to be suffered.[42] While the revocation of parole or probation will result in the immediate loss of freedom and the return to prison, "[t]he deprivation [of good-time] . . . does not then and there work any change in the conditions of [the prisoner's] liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good-time may be restored."[43] With respect to the revocation of good-time, a reduction in the required procedures may be justified on the basis of this distinction. However, a reduction in procedures seems less justified when the punishment imposed is confinement in a disciplinary cell. In this situation, the loss is just as immediate and, arguably, just as serious as the revocation of parole or probation.

The state's interest in maintaining order within its prisons and "in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live

37. Prisoners in the North Carolina corrections system are eligible for work-release privileges only while they maintain "honor" grade. *Id.* § 3-201.

38. In Jackson v. Wise, 43 U.S.L.W. 2272 (C.D. Cal. Dec. 10, 1974), a federal district court held that due process is required before an inmate's parole release date can be rescinded or modified in a prison disciplinary proceeding.

39. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

40. 418 U.S. at 560.

41. *Id.* at 561.

42. *Id.* at 560-61.

43. *Id.* at 561.

within the law when they are released . . . ." is the major reason given by the Court for not adopting the *Morrissey-Gagnon* procedures.[44] The validity of this rationale can be effectively analyzed only in conjunction with a discussion of each of the procedural safeguards required in *Morrissey* and *Gagnon.*

Written Notice of the Claimed Violations

Wolff required "that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshall the facts and prepare a defense."[45] To insure that the ability to prepare a defense is not denied *de facto*, the Court also required that "a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare . . . ."[46]

One purpose of notice is to clarify the charges,[47] and it is questionable whether written notice of a named violation, without more, will satisfy this objective. Some correctional systems presently punish inmates for violations such as "agitation" and the use of "profane, contemptuous or threatening" language.[48] An inmate charged with such conduct is often unaware of the factual nature of the wrongdoing with which he is charged. A solution that would enable an inmate, upon receipt of notice, better to understand both the nature and implications of the charge lodged against him would be to require that inmates be given, upon entering prison, a written, unambiguous delineation of the acts that constitute violations of prison rules and regulations and of the punishments that may be imposed for such acts. Arguably, due process compels this procedure to avoid vagueness.[49] The further step by prison authorities of providing all incoming inmates with an orientation to prison rules and regulations would also be helpful in this context.

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44. *Id.* at 562-63.

45. *Id.* at 564. The right to written notice of the claimed violations was also required in Morrissey v. Brewer, 408 U.S. at 489.

46. 418 U.S. at 564. Arguably, twenty-four hours is not long enough since the inmate may be required to continue his normal working duties and other prison responsibilities for a large part of this period. It should be remembered, however, that the Court set only a minimum period. State prison authorities are free to give more than twenty-four hours advance notice if they desire.

47. *Id.*

48. *See, e.g.*, GUIDEBOOK, *supra* note 2, §§ 2-301(12), -302(1).

49. *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

Disclosure to the Inmate of the Evidence Against Him

Wolff did not explicitly require that the disciplinary defendant be given a summary of the evidence against him prior to the hearing. Arguably, the Court intended that such a summary be part of the notice of charges since the notice contemplated by the Court is "to give the charged party a chance to marshall the facts in his defense and to clarify what the charges are, in fact."[50] Notice sufficient to meet this standard would necessarily have to include a summary of the evidence since mere notice of a named violation would in no way relate the factual basis for the charges or apprise the inmate of the allegations he must rebut in his defense.

The only interest the State could have for denying disclosure of the evidence against an inmate would be that of insuring the safety of an anonymous inmate "informer." Disclosure of the inmate accuser's identity either directly or indirectly through too much detail could result in retaliation against the "squealer."[51] This danger would seem to be present in only a small minority of disciplinary proceedings since most violations are reported by correctional officials, not fellow inmates.[52] Thus, the right to disclosure of the evidence should be required in all cases except those in which prison authorities justify its denial in writing.

Opportunity to be Heard in Person and to Present Witnesses and Documentary Evidence

The opportunity to be heard in person is presumed,[53] and the right to present witnesses and documentary evidence is explicitly granted by *Wolff* with some limitation.[54] In the Court's words, "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[55]

50. 418 U.S. at 564. The right to disclosure of the evidence against the accused was also required in Morrissey v. Brewer, 408 U.S. at 489.

51. Wolff generally recognized this concern by its reference to "the unwritten code that exhorts inmates not to inform on a fellow prisoner." 418 U.S. at 562.

52. *Id.* at 587 (Marshall, J., dissenting).

53. No other conclusion could explain the Court's continued references to "the hearing." *See, e.g., id.* at 561.

54. *Id.* at 566. The opportunity to be heard in person and to present witnesses and documentary evidence was also required in Morrissey v. Brewer, 408 U.S. at 489.

55. 418 U.S. at 566.

The importance of the opportunity to call witnesses and present documentary evidence cannot be denied. "This gives the accused the opportunity to corroborate his own version of events, to prove an alibi defense, and in general to overcome his captors' suspicions as to his veracity by reason of his substantial interest in the outcome of the proceedings."[56] Furthermore, "[t]he right to present the testimony of impartial witnesses and real evidence . . . is particularly crucial to an accused inmate, who obviously faces a severe credibility problem when trying to disprove the charges of a prison guard."[57]

However, just as the importance of the opportunity to call witnesses and present evidence cannot be denied, the state's interests in denying that opportunity in certain cases can not be ignored. *Wolff* recognized two major state interests—institutional safety and correctional goals—which could justify denial of the opportunity to call witnesses and present evidence.[58]

The threat to prison safety caused by the unrestricted right to call witnesses is real. For example, witnesses could be used by inmates to subvert the efforts of authorities to maintain order by the separation of subversive elements. In addition, there may be cases in which the testimony of a particular witness could reveal, either directly or indirectly, the identity of an anonymous informant and thereby create a risk of reprisal. In these situations prison officials must be able to deny the opportunity to call witnesses in order to insure the safety of staff personnel and other inmates within the institution.

Furtherance of correctional goals is more difficult to justify as a reason for denying the opportunity to call witnesses and to present evidence. The Court cites the need for the "swift and sure" disciplining of some inmates as a general justification for reduced procedural safeguards in prison disciplinary proceedings.[59] This proposition seems totally without merit.[60] Allowing an inmate to call a rea-

56. Herman, Schwartz, Kolleeny, Campana, & Harvey, *Due Process in Prison Disciplinary Proceedings: Meyers v. Alldredge*, 29 GUILD PRAC. 79, 87 (1970) [hereinafter cited as Herman].

57. 418 U.S. at 583 (Marshall, J., dissenting).

58. *Id.* at 566.

59. *Id.* at 563.

60. "Almost all major penologists recognize that an open and fair administrative process contributes to prisoner rehabilitation and institutional harmony." Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 830 (1969). In addition it is thought that, "speedy punishment, unless fairly and justly imposed, will

sonable number of witnesses and present a reasonable amount of documentary evidence will cause only slightly more delay in the imposition of punishment than will result from the required advance notice of the charges[61] and the required hearing.[62] Furthermore, prison authorities can effectively limit the number of witnesses and amount of evidence through their power to exclude irrelevant and repetitious matters.

When terms as broad as institutional safety and correctional goals are used to define discretion given state officials, the possibility of arbitrary action exists. One means of reducing this possibility is to require state officials to justify their actions in writing. *Wolff* suggested this technique but did not require it.[63] It should be noted, however, that the only apparent state interest for not giving written justifications is one of avoiding the cost and inconvenience that accompany any additional paperwork. Surely this is not a significant enough interest to outweigh the need to control arbitrary action.

The Right to Confront and Cross-examine Adverse Witnesses

The rights of confrontation and cross-examination have been held essential in criminal trials[64] and in other types of cases "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings."[65] Mr. Justice Marshall in his dissent from *Wolff* argued that

> confrontation and cross-examination are as crucial in the prison disciplinary context as in any other, if not more so. Prison disciplinary proceedings will invariably turn on disputed questions of fact . . . and, in addition to the usual need for cross-examination to reveal mistakes of identity, faulty perceptions, or cloudy memories, there is a significant potential for abuse of the disciplinary process by "persons motivated by malice, vindictiveness, intolerance, prejudice or jealously," . . . whether these be other inmates seeking revenge or prison guards seeking to vindicate their otherwise absolute power over the men under their control.[66]

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not only fail to serve as a deterrent to similar conduct but will also counter efforts at rehabilitation." Herman, *supra* note 56, at 88.

61. *See* text accompanying notes 45-46 *supra.*

62. *See* text accompanying note 53 *supra.*

63. 418 U.S. at 566.

64. Pointer v. Texas, 380 U.S. 400 (1965).

65. Greene v. McElroy, 360 U.S. 474, 496 (1959); *accord,* Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

66. 418 U.S. at 585-86.

Despite these persuasive arguments in favor of allowing confrontation and cross-examination in prison disciplinary proceedings, the majority in *Wolff* felt that the state's interests outweighed the inmate's and, thus, they denied these rights in all cases.[67]

In analyzing the policies supporting the denial of confrontation and cross-examination it is helpful to distinguish between two possible situations: first, where the accused inmate seeks to confront and cross-examine a previously anonymous inmate informant; secondly, where the accused inmate seeks to confront and cross-examine a known inmate informant or a prison official who is the accusing party.

In the first situation the majority felt that the "high risk of reprisals" that would result from disclosure of an inmate informer's identity justified the denial of confrontation and cross-examination.[68] This reasoning is sound because a contrary holding would effectively end all inmate cooperation in the disciplinary process. However, to guard against the abuses envisioned by Mr. Justice Marshall[69] it would be helpful for the disciplinary hearing board to examine the inmate informant to test his credibility.

The denial of confrontation and cross-examination is less easily justifiable when the accuser is a prison official or a known inmate informant. The majority conceded that fewer dangers arise in this context than in the anonymous inmate informant situation.[70] Yet they declined to require confrontation and cross-examination, choosing to "leave these matters to the sound discretion of the officials of state prisons."[71]

Traditionally, two arguments have been made to support the denial of the right of confrontation and cross-examination of prison guards.

> First, . . . if inmates are given the right to confront accusers, who are usually prison guards, then these guards must appear at hearings instead of performing security functions. This would necessitate significant diversion of security resources. Second, allowing inmates adversarial rights will erode the traditional inmate-staff relationship by placing inmates and staff on the same level for a brief period of time.[72]

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67. *Id.* at 567-68.
68. *Id.* at 568.
69. *See* text accompanying note 66 *supra.*
70. 418 U.S. at 568.
71. *Id.* at 569.
72. Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27, 45 (1971).

Assuming that hearings could not be held when the services of the guard were not required, the time the guard spends attending the hearing must be balanced against the value of confrontation and cross-examination as methods for discovering truth and determining credibility. Surely, requiring one guard to leave his duties for a short time to testify will not significantly reduce security within the prison. If it does, the state should be required to provide additional personnel. In any case, the possible inconvenience and additional costs of requiring confrontation and cross-examination should not outweigh the need for ascertaining the truth.[73]

The factual basis of the second argument is unclear. The President's Task Force Report on Corrections found, to the contrary, "that staff control can be greatest . . . if rules regulating behavior are as close as possible to those which would be essential for law and order in any free community . . . ."[74] "More important is the fact that authority premised only on power and an avoidance of any outside scrutiny is not worth preserving, particularly at the expense of a prisoner's right to a legitimate search for truth at the hearing."[75]

Wolff seemed to rely primarily on a third "danger" to justify denial of confrontation and cross-examination—"the resentment which may persist after confrontation."[76] However, since the accused inmate already knows who the accusing party is, it seems unlikely that his resentment would be significantly increased by confrontation. In fact the possibility of increased resentment that might occur as a result of harsh, vindictive questioning could be controlled either by the hearing board or by interposing a counsel substitute.[77]

Upon examination, the denial of confrontation and cross-examination appears justified only in cases in which the accuser is an anonymous inmate informant. Nevertheless, *Wolff* has allowed this rare situation to set the rule for the more common situation in which a prison guard presses the charges. As Mr. Justice Marshall states in his dissent, "[t]his is surely permitting the tail to wag the constitu-

73. "It has been repeatedly held by the Supreme Court that fundamental constitutional rights may not be sacrificed in the interest of administrative and fiscal efficiency." *Id.* at 44. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 90-91 n.22 (1972); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970); Harman v. Forssenius, 380 U.S. 528, 542 (1965).

74. CORRECTIONS, *supra* note 3, at 50.

75. Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements*, 18 S.D.L. REV. 309, 324 (1973).

76. 418 U.S. at 569.

77. *See* text accompanying note 97 *infra*.

tional dog."[78] A more satisfactory solution would be to require confrontation and cross-examination except in cases where the danger to the witness is overwhelming in the eyes of the hearing board.[79]

A "Neutral and Detached" Hearing Body

Wolff held that the Nebraska hearing board, which was made up exclusively of prison officials, was sufficiently impartial to satisfy due process requirements.[80] This finding is clearly limited to the facts of *Wolff* and, thus, does not set the standard for all hearing boards.[81] However, since due process does require an impartial hearing[82] and since this "is a particularly difficult requirement to satisfy within the confines of a closed institution,"[83] the problems of allowing prison officials to judge the conduct of inmates must be examined.

> In a small, closed institution . . . staff members are familiar with many of the inmates and usually bring to the Board hearings a great deal of personal knowledge about a particular inmate and sometimes bias, either favorable or unfavorable, toward him. The result often is that the disciplinary decision is made on the basis of the personal and usually unarticulated feelings of a staff member, rather than on the facts presented at the hearing.
>
> Board members may not act impartially because they feel that their duty is to support the staff in all cases. As one Board member put it, "[t]he philosophy in the past has been always back up your officers, whether they are right or wrong." Such a view is particularly harmful to the integrity of the disciplinary process, when, as in most contested hearings, the evidence consists mainly of conflicting testimony by the prisoner and a staff member.
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> Another factor which may affect the disposition of the case is the inmate's behavior before the Board. An inmate who is "defiant" or had a "hard attitude" or insists on his "rights" is unlikely to win the sympathy of the Board.[84]

These factors substantiate the view that prison staff personnel cannot be impartial when judging inmates. However, upon exami-

78. 418 U.S. at 587.

79. A requirement that denials be justified in writing would prevent this exception from swallowing the rule and would reduce the "great litigation and attendant costs," feared by the majority. *Id.* at 569.

80. 418 U.S. at 570-71. A "neutral and detached" hearing body was also required in Morrissey v. Brewer, 408 U.S. at 489.

81. *See* 418 U.S. at 570-71.

82. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

83. Wick, *supra* note 75, at 323-24.

84. Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L. & C. 200, 210 (1972).

nation, the only viable alternative—bringing in "outsiders" to sit on hearing boards[85]—is even less desirable. "Outsiders" should not be paid since if the state pays them they could become as entrenched in the system as other staff personnel. Persons who would volunteer to serve would likely be those community citizens with the most interest in and concern about the correctional system. They could be as biased in favor of prisoners as the hearing board might be against them. True, these "outsiders" would probably not have personal knowledge about individual inmates but neither would they have the personal knowledge of prison life that is valuable in judging credibility.

Most importantly, if "outsiders" were allowed to impose disciplinary sanctions on inmates there would be a separation of authority from responsibility, which would reduce morale among the prison staff and which might encourage arbitrary action. If prison guards felt a group of "outsiders" who didn't understand prison life would be scrutinizing their every move, they might be inclined to avoid the disciplinary process altogether "either by disciplining the inmates informally or by ignoring infractions of the prison rules."[86]

The best solution may be to leave both the authority and the responsibility for prison discipline with prison officials. At the same time, the possibilities for bias could be reduced by preventing those persons from serving on the board who have participated in the investigation of the case, are witnesses, are charged with subsequent review, have personal knowledge of a material fact, have prior involvement with the accused, or have a personal interest in the outcome.[87]

A Written Statement by the Factfinders of the Evidence Relied on and Reasons for the Disciplinary Action Taken

Wolff held that there must be a written statement of the the evidence relied on and reasons for the action taken.[88] This requirement

85. Wick, *supra* note 75, at 324.

86. Harvard Center for Criminal Justice, *supra* note 84, at 209.

87. Sands v. Wainwright, 357 F. Supp. 1062, 1084 (M.D. Fla. 1973). This standard could be met by bringing in staff from other parts of the prison complex who have duties which would not put them in as close contact with the prisoners as guards. Such a group might include administrators and counselors.

88. 418 U.S. at 564. A written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action taken was also required in Morrissey v. Brewer, 408 U.S. 489.

insures that inmates will be protected "against collateral consequences based on a misunderstanding of the nature of the original proceeding."[89] In addition, a written record of the proceedings gives inmates the reasons for their winning or losing and, thus, instills confidence in the system.[90] The Court recognized that there may be a need to exclude certain items of evidence in some cases[91] but, in general, it perceived "no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements."[92]

Right to Counsel or Counsel Substitute

The Court in *Wolff* denied the right to retained or appointed counsel in prison disciplinary proceedings.[93] In denying this right, the Court relied on the effect counsel would have on the nature of the proceedings and on the practical problems of delay and increased costs.[94] The insertion of counsel was viewed as giving "the proceedings a more adversary cast . . . ."[95] This surely would be the result since counsel are "bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views."[96]

However, the Court failed to answer the question of whether an adversary hearing is necessarily evil. Surely such a hearing would insure a fairer presentation of the facts and would enhance the search for truth. In addition, the interposition of counsel would reduce the resentment the Court feared would result from allowing confrontation.[97] On the other hand, adversary proceedings could reduce the ability of disciplinary boards to accomplish correctional goals. The hearing would become a win or lose situation with little room for rehabilitative compromise. Furthermore, the problems of morale and the tendency to avoid the disciplinary process which were discussed in relation to the use of "outsiders" on hearing boards would again be raised if outside counsel were allowed.[98]

89. 418 U.S. at 565.
90. *See* Wick, *supra* note 75, at 325.
91. 418 U.S. at 565.
92. *Id.*
93. *Id.* at 570 . The right to counsel or counsel substitute was required in Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).
94. 418 U.S. at 569-70, *quoting* Gagnon v. Scarpelli, 411 U.S. 778, 787-88 (1973).
95. 418 U.S. at 570.
96. Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973).
97. *See* text accompanying notes 76-77 *supra.*
98. *See* text accompanying note 86 *supra.*

The arguments both for and against counsel are persuasive when the effect on the nature of the proceeding is all that is considered. However, the practical concerns of delay and increased cost tip the scale in favor of the denial of retained or appointed counsel. More questions will be asked, objections made, and rulings required when counsel is present. As a result the record will become more detailed and, thus, require additional time to prepare. Increased cost will ensue from the use of appointed counsel for indigent inmates and counsel for the state.[99] In addition, the lengthened disciplinary process will require additional personnel and facilities for its operation.

Having denied retained and appointed counsel to the disciplinary-action defendant, the Court held that substitute aid from either staff personnel or other inmates must be provided "[w]here an illiterate inmate is involved or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case . . . ."[100] The use of staff personnel as counsel substitutes presents problems. Staff members are put in the position of representing inmates against fellow staff members. If they become strong advocates for inmates they may be criticized by their fellow workers and if they don't they may not be effective aid to the inmates.[101]

The alternative of allowing inmates to act as substitute counsel is no better. Inmate represenatives may use the hearing as an opportunity to express their own feelings and frustrations. Such activity would reduce the effectiveness of the aid and could damage the accused's case. In addition, there is the danger that a few inmates may be able to control who can get help and how much those who get it must pay for it. In spite of the problems that may arise in a substitute aid plan, and particularly in view of the inmates' need for assistance, counsel substitutes appear to be the best available solution.

CONCLUSION

The promise of due process given by *Wolff* is a welcomed step toward the protection of prisoners' rights. However, "[i]t is an empty promise to guarantee fairness while omitting the tools necessary to accomplish that fairness."[102]

99. Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973).
100. 418 U.S. at 570.
101. Harvard Center for Criminal Justice, *supra* note 84, at 208.
102. Millemann, *supra* note 72, at 50.

The Court's provisions for notice of the charges, opportunity to call witnesses and to present real evidence, and a written record of the evidence relied on and reasons for the action taken[103] are crucial to a fair hearing and their importance must not be ignored. The effectiveness of these procedures for insuring fairness, however, is diminished by the denial of confrontation and cross-examination.

First, although notice is required in part to "enable [the inmate] to marshal the facts and prepare a defense,"[104] "[a]bsent confrontation and cross-examination, . . . the party proceeded against is without knowledge of the adverse evidence and cannot, therefore . . . make his defense."[105] Furthermore, without the chance to "challenge the word of his accusers"[106] given by the rights of confrontation and cross-examination, it will be considerably more difficult for the prisoner to " 'explain away the accusation' "[107] since he cannot show mistake by the other party. Finally, even the most impartial hearing board cannot fairly judge credibility, nor accurately determine which version of the disputed facts is true if one side in the contest is not even questioned.[108]

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Labor Law—Organizational Rights of Managerial Employees

In 1970 the National Labor Relations Board (NLRB) abruptly departed from the position it had maintained throughout its history on the status of managerial employees under the National Labor Relations Act (NLRA).[1] Traditionally, the Board had excluded from bargaining units and from coverage by the Act, all employees whom it identified as managerial,[2] even though these employees were never statutorily ex-

103. 418 U.S. at 581 (Marshall, J., dissenting).
104. *Id.* at 564.
105. Sands v. Wainwright, 357 F. Supp. 1062, 1087 (M.D. Fla. 1973).
106. 418 U.S. at 582 (Marshall, J., dissenting).
107. Sands v. Wainwright, 357 F. Supp. 1062, 1086 (M.D. Fla. 1973), *quoting* Escoe v. Zerbst, 295 U.S. 490, 493 (1935).
108. 418 U.S. at 582.

1. 29 U.S.C. §§ 141-87 (1970).
2. For a history of the status of managerial employees see NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 275-90 (1974).